LEE KAM SUN

v.

HO SAU LIN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[CIVIL SUIT NO: S5-22-297-1999]
7 OCTOBER 1999

LEGAL PROFESSION: *Liability as fiduciary - Conflict of interest and duty - Proximity of lawyers within same firm - Whether oral evidence might be introduced at trial*

On 14 September 1998, the plaintiff entered into a sale and purchase agreement to purchase two industrial lots from the 1st defendant. The solicitors for the transaction were M/s Cheah Teh & Su ('CTS') for the plaintiff while the 2nd defendant acted for the 1st defendant. However, because an issue arose as to whether the sale of the property included two parking bays in the industrial complex, the defendants withheld from perfecting the documentation for the transaction. The plaintiff then terminated the agreement and filed a writ against the defendants seeking a declaration that the agreement had been terminated and claimed the return of the purchase price with punitive damages. At the hearing of the plaintiff's application for summary judgment, counsel for the 1st defendant raised the preliminary objection that CTS should be disqualified from further representing the plaintiff in this case as CTS might be brought in as a party to the proceedings or called upon to testify.

Held:

[1] The parties may introduce oral evidence to support or deny the assertion of a collateral agreement as claimed in the statement of claim, and on such an occasion the solicitors of CTS handling the conveyancing of the property may be called upon to give evidence, which undoubtedly will be more than a formality in presenting a document or affirming an attestation of it. For these reasons, CTS should discharge themselves from acting for the plaintiff to maintain decorum and avoid a conflict of interest.

[2] The firm of CTS was the retainer and the proximity and relationship of the partners and legal assistants within the same firm was too close for comfort to ensure that a conflict of interest would not arise.

[Defendants' preliminary objection allowed.]

Case(s) referred to:
Emperor v. Dadu Ramu AIR [1939] Bom 150 ***(refd)***
PP v. Vengadasalam & Ors [1990] 1 CLJ 810 ***(foll)***
Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing [1997] 3 CLJ 754 ***(foll)***
Wong Sin Chong & Anor v. Bhagwan Singh & Anor [1993] 4 CLJ 345 ***(foll)***

Legislation referred to:
Evidence Act 1950, s. 92
Legal Profession (Practice & Etiquette) Rules 1978, ss. 3, 4, 5, 27, 28(a), 29
Rules of the High Court 1980, O. 81

For the plaintiff - TS Su (Jayne Koe with him); M/s Cheah Teh & Su
For the 1st defendant - Edward Chin (V Krishnan with him); M/s Kris & Edward Chin
For the 2nd defendant - T Sudharsanan; M/s Shook Lin & Bok

Reported by Izzaty Izzuddin

JUDGMENT

James Foong J:

Introduction

Enclosure 5 is an application of the plaintiff for summary judgment under O. 81 Rules of High Court (RHC).

The facts of this case is simply this: On 14 September 1998 the plaintiff agreed under a sale and purchase agreement (the S&P agreement) to purchase two industrial lots (the property) in an industrial complex at Bandar Petaling Jaya from the 1st defendant for a sum of RM400,000. Subsequent to the execution of the S&P agreement the plaintiff paid the full purchase price according to the terms and conditions wherein, part of it (RM60,000) was deposited with the 2nd defendant who is a solicitor for the 1st defendant as stakeholder. In consequence of this, relevant deeds of assignment of the property (there being no individual document of title issued) were executed by the parties. They are yet, however, to be perfected with the consent of the developer. The delay in perfecting the documentation was due to withholding of these documents by the defendants for reason that there is a dispute over two parking bays in the industrial complex. According to the 1st defendant the sale of the property does not include these car parks whilst the plaintiff is of a different view. Unable to resolve this dispute, the plaintiff terminated the S&P agreement insisting that the 1st defendant did not perform her part of the obligation in perfecting the deeds of assignment. This was soon followed by the filing of a writ against the defendants seeking a declaration that the S&P agreement is terminated and claiming the return of the purchase price with punitive damages. Enclosure 5 is a sequence of this process.

Preliminary Objection

At the outset of the hearing of encl. 5, 1st defendant counsel raised a preliminary objection that M/s Cheah, Teh & Su (CTS), the firm of advocates and solicitors acting for the plaintiff, should be disqualified from further representing the plaintiff in this case. His ground is that CTS were solicitors for the plaintiff in drawing up the S&P agreement and were actively advocating that the car parking bays were appurtenant to the property. Further, there is a possibility that CTS may be brought in as a party to this proceedings by the defendants or called upon by them to testify. In view of this, CTS has breached ss. 3, 4, 5, 27, 28(a) and 29 of the Legal Profession (Practice and Etiquette) Rules 1978 (the Etiquette Rules).

Miss Khoo, joined subsequently by Mr. Su, of CTS argued strenuously that the facts of this case do not warrant the disqualification of their firm to act for the plaintiff. In any event both Miss Khoo and Mr. Su declared that they were not solicitors involved in this property transaction and thus, will not be called to testify as witnesses. Further, they claimed that the defendants have acknowledged and recognised CTS's role as advocates and solicitors in this case by making no prior protestation and serving on CTS interlocutory applications.

Analysis

It is a well-established principle that lawyers should not act as counsel and witnesses in the same proceedings. The reason, as expounded by Beaumont CJ in *Emperor v. Dadu Ramu* AIR [1939] Bom 150, is: "An advocate cannot cross-examine himself, nor can he usefully address the court as to the credibility of his own testimony, and a court may feel that justice will not be done if the advocate continues to appear." This rule is expressly accepted by the Federal Court in *Wong Sin Chong & Anor v. Bhagwan Singh & Anor* [1993] 4 CLJ 345; [1993] 3 MLJ 679. But in the list of authorities combed over by Justice Malik Ishak in *Syarikat Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing t/a Bengkel Sen Tak* [1997] 3 CLJ 754; [1997] 3 AMR 2947 there are exceptions to this rule. It does not apply if the testimony of the advocate and solicitor so acting relates to matters which are formal and non – contentious such as – identification, attestation, custody of documents and the like. In fact the Etiquette Rules – s. 28(a) only prohibits such advocate and solicitor from appearing in respect of a "material and disputed question of fact". The reason for this limitation is best illustrated in the case of *Emperor v. Dadu Ramu*, where again Beaumont CJ proceed with: "On the one hand, an accused person is entitled to select an advocate whom he desires to appear for him, and certainly the prosecution cannot fetter that choice. On the other hand, the court is bound to see that the due administration of justice is not in any way embarrassed."

Having determined the set of principles applicable one must proceed to examine from available facts to decide whether the circumstances of this case warrants the up-holding of the defendants' objection.

It is not disputed that the S&P agreement is silent on whether the car parking bays are an appurtenant of the property. In the preparation of this agreement the plaintiff was represented by CTS whilst the 1st defendant by the 2nd defendant. When the issue over the car park bays arose, the respective advocates and solicitors took positions in the interpretation of the terms of the S&P agreement. If the issue of this case is confined only to the interpretation of the terms then s. 92 of the Evidence Act will apply and no oral evidence will be admitted to contradict, vary, add to or subtract from it. In such a situation, any testimony of CTS will be limited to the attestation of the agreement and thus falls within the exceptions of this rule on the conflict of interest in acting for the plaintiff. But in para. 8 of the plaintiff's statement of claim, besides alleging that it is an implied term in the S&P agreement that the car parking bays are included in the sale of the property, it added: "and/or a collateral agreement that the car park lots identified as Lot No. CP108 & CP109 are parcels appurtenant to the Properties and shall form part of the said Properties ..." This claim of a collateral agreement immediately falls within the proviso of s. 92 of the Evidence Act for parties to introduce oral evidence to support or deny this assertion and on such an occasion the solicitor in CTS handling the conveyancing of the property may be called upon by the defendants to give evidence. His testimony will undoubtedly be more then a formality in presenting a document or affirming to an attestation of it. For this, I am of the view that CTS should discharge themselves from acting for the plaintiff to maintain decorum and avoid a conflict of interest as elaborated above.

On the proposition put forth by both Miss Khoo and Mr. Su that they were not the solicitors involved in the conveyancing of the property and for this they should be allowed to act for the plaintiff here, I am afraid that they have not considered the fact that it is not they who were retained by the plaintiff in this suit. The firm of CTS was the retainer and as duly considered by Justice Malik Ishak in *Syarikat Pengangkutan* case, the proximity and relationship of partners and legal assistants in the same firm is too close for comfort that a conflict of interest will not be practiced. As a reminder, it is ingrained in our legal system that: Justice must not only be done but must also be seen to be done, and for this, without casting any aspersion to the integrity of both Miss Khoo and Mr. Su, I am not convinced by the argument advanced on this point.

Finally, on the question of jurisdiction, which I was initially rather concerned with, I am aided by the authorities of *Wong Sin Chong (supra)*, *PP v. Vengadasalam & Ors* [1990] 1 CLJ 810; [1990] 1 MLJ 507 and *Syarikat Pengangkutan (supra)* to say that I possess an inherent jurisdiction to order CTS from acting for the plaintiff in this suit.

Conclusion

Accordingly I hereby allow the defendants' preliminary objection and order CTS be prohibited from acting further for the plaintiff in this suit There shall be no order as to cost. Further, in view of the disqualification of CTS the hearing of the substantive issue in encl. 5 must be adjourned to allow the plaintiff to appoint new advocates and solicitors to act for him.